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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 973

ALLAN W. BATH,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in the above-entitled case on December 11, 1964.

Citations to Opinions Below.

The final opinion of the Supreme Judicial Court is reported in the Massachusetts Advance Sheets (1964) at pages 1213 to 1217, and has not been reported unofficially. A copy of said opinion is printed in Appendixes B and D to this petition at pages 21 and 35, *infra*. The opinion of the Superior Court of the Commonwealth of Massachu-

setts is unreported and appears in Appendix A of this petition (p. 15, *infra*).

Jurisdiction.

The Supreme Judicial Court rendered its decision on October 30, 1964 (R. 54), affirming a judgment of the Superior Court of the Commonwealth of Massachusetts entered on May 2, 1964 (R. 30; p. 20, *infra*). Petitioner filed an application to the Supreme Judicial Court for a rehearing, and this application was denied by said Court on November 30, 1964 (R 49). Final judgment was entered in the Supreme Judicial Court on December 11, 1964 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), because petitioner was denied a right claimed under the Constitution of the United States.

Questions Presented.

I. Whether a defendant in a criminal action may have his conviction affirmed by a state appellate court on the basis that he committed a crime of which he had no notice at the trial.

A. Whether it is a violation of the Due Process Clause if a state appellate court upholds a conviction for the violation of a penal statute on the sole basis of an unforeseeable and retroactive interpretation and expansion of the narrow and precise statutory language.

B. Whether it is a violation of the Due Process Clause for a state appellate court to affirm a conviction upon a complaint that a penal statute was violated on the basis that the defendant committed a crime at common law.

Constitutional Provision and Statute Involved.

The constitutional provision involved is the Fourteenth Amendment of the United States Constitution, the relevant part of which is as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The statute involved is Massachusetts General Laws, c. 268, § 14A, which reads as follows:

> "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

Statement.

At all times material hereto, the petitioner, Allan W. Bath, hereinafter referred to as "Bath," was Vice-President of John Bath & Company, Inc., hereinafter referred to as the "Company," and Ronald K. Larson was an employee of the Company. Larson was summoned as a traverse juror for the Worcester County Superior Court for a term of approximately one month commencing April 2, 1962. Bath directed Larson to work from 7:30 to 9:15 a.m. while on jury service, under penalty of discharge. Larson declined to do so and Bath discharged him from the Company's employ (R. 24-26; pp. 15-17, *infra*).

Complaints were issued from the Worcester Superior Court against the Company and against Bath individually. Each complaint was entitled, "Complaint Contempt of Court under General Laws, Chapter 268, Section 14A" (R. 10, 12). The Company was convicted and that case is not here in issue. The complaint against Bath was as follows:

"COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. Superior Court

COMMONWEALTH OF MASSACHUSETTS

vs.

ALLAN W. BATH

COMPLAINT

CONTEMPT OF COURT UNDER GENERAL LAWS, CHAPTER 268, SECTION 14A

To the Honorable the Justices of the SUPERIOR COURT holden in WORCESTER, in the County of Worcester, and Commonwealth of Massachusetts WILLIAM T. BUCKLEY, District Attorney for the Middle District in said County, in behalf of said Court, on oath complains:

1. That Allan W. Bath, individually and as Vice-President, Manufacturing of John Bath & Company, Incorporated, a corporation duly organized by law and having its usual place of business in the City and County of Worcester, on or about the twenty-third day of April, 1962, at Worcester in said County discharged from or deprived of his employment Ronald K. Larson, 3 Park Hill Avenue, Millbury, then an employee of the said John Bath & Company, Incorporated, because of his attendance or service as a traverse juror in the Superior Court at Worcester;

2. That said Allan W. Bath thereby committed a contempt of said Superior Court upon which the said Ronald K. Larson, is and has been in attendance and serving as a traverse juror.

And he prays that due process be issued to bring the Defendant before the Court and show cause why he should not be judged in contempt and the said Defendant be held to answer to this complaint and further dealt with relative hereto, according to law.

WILLIAM T. BUCKLEY

Worcester, ss. Worcester, April 27, 1962

Personally appeared the above named William T. Buckley and made oath that the foregoing is true and correct to the best of his knowledge and belief, before me,

FRANCIS J. MCTIGUE, JR.
Justice of the Peace" (R. 10-11).

Bath filed a motion to quash the complaint and an answer to it, and alleged in each instrument that to establish the contempt with which he was charged the Commonwealth had the burden of alleging and proving that he was Larson's employer, and that the complaint failed to allege such facts as would constitute him Larson's employer and that he was not Larson's employer (R. 20, 14). The motion to quash was denied by the trial judge. After trial, the trial judge filed findings of fact and rulings of law and adjudged Bath in contempt of court (R. 24-30; pp. 15-20, *infra*). The trial judge ruled and found as follows:

"The statutory command to the corporation is, in effect, a command to those individuals within the cor-

poration who are responsible for the discharge of the employee-juror. In this case Allan W. Bath was the individual so responsible and I so find.

"He has failed to do what the law required of him and he may be thus liable in his natural capacity.

"This is no more than to say that the contempt of the corporation is as well the contempt of that agent of the corporation who committed the contumelious act.

"*Wilson* vs. *U.S.* 231 U.S. 361

"*Commissioners* vs. *Sellew* 99 U.S. 624, 627." (R. 29; p. 20, *infra.*)

The trial Court held in substance that the statute was directed to the conduct of employers and that the term "employer" within the statute includes the agent of a corporate employer who is responsible for the discharge of the employee.

By means of a petition for writ of error Bath sought to have the Massachusetts Supreme Judicial Court set aside the judgment of the Superior Court. On October 30, 1964, the Supreme Judicial Court rendered its decision affirming the judgment of the Superior Court (R. 54, blue backer following R. 61). In its opinion the Court made note of Bath's contention that he was not guilty as charged because he was not an employer within the meaning of the applicable statute (R. 39, 60; p. 24, *infra*). In this opinion the Court manifestly held that Bath was not Larson's employer but that that was of no consequence, because his conduct constituted contempt apart from the statute. The Court held that the fact that he was not charged with common-law contempt and that there was reference to the statute in the entitlement of the complaint was inconsequential, stating that "in the prosecution of a case for contempt

technical accuracy of pleading is not required" (R. 39-40; p. 25, *infra*).

Thereafter, Bath, through his counsel, petitioned for a rehearing, asserting that to affirm the conviction on the ground that the facts as found by the trial judge constituted common-law contempt constituted a deprivation of the due process guaranteed by the United States Constitution, Amendment XIV, § 1 (R. 41; pp. 26-27, *infra*). In the petition for rehearing counsel called the Court's attention to the fact that Bath was not charged with common-law contempt but rather was charged with the one and only contempt provided by G.L. c. 268, § 14A, which is violation by an employer of the prohibition against discharging employee-jurors. The petition for rehearing was denied, but the Court's opinion was changed by the deletion of the next to last paragraph and the substitution of a new paragraph (R. 49, 50; p. 35, *infra*). In the new paragraph the Court states that it is enough that the complaint alleged that Bath, as Vice-President of the corporation, discharged Larson because of his service as a traverse juror and that Bath thereby committed a contempt of court, and that Bath did act as the effective agent of the corporation in causing the discharge. The Court held that in so acting Bath violated the mandate of the statute that "No person shall be discharged . . . because of his . . . service as a . . . juror. . . ." The Court held that the reference to the statute in the title of the complaint required no more than that Bath's "violation of the statute" be shown, and that "such violation was a contempt apart from the statutory specification of the employer's contempt" (R. 50; p. 35, *infra*).

Perhaps the Court's holding in its revised opinion is that the complaint set forth, and the trial judge found, conduct that constituted contempt at common law, and that the reference to the statute in the title of the complaint

required only that the conduct constituting the common-law contempt of which Bath was convicted be also conduct which is prohibited by the statute, without reference to whether the conduct be by an employer or by someone else. In the alternative, the Court's holding was that Bath was found to have violated the mandate (first sentence) of the statute, and, since no penalty therefor was provided by the statute, the Court has inherent power to punish for the statutory offense on the theory that it can punish for any statutory offense of a criminal nature where no punishment is provided in the statute. If this is the Court's reasoning, the Court is interpreting the statute to apply to employers and to everyone else, despite the second sentence of the statute, which provides: "Violation of this section by an employer shall be a contempt of . . . court . . . and such employer may be prosecuted upon complaint . . . and be punished for such contempt."

Reasons for Granting the Writ.

1. The final decision of the Massachusetts Supreme Judicial Court was a deprivation of Allan Bath's reputation and property without due process of law. This is true whether the conviction is based on a holding that he was guilty of a common-law contempt, or on a holding that G.L. c. 268, § 14A, applies without regard to whether Bath was an employer.

In its final opinion the Supreme Judicial Court said:

> "The statute gives legislative recognition to the proposition that discharging an employee because of jury duty would be interference with the court. Apart from the statute's declaration that violation of its terms is contempt, the court would have power to punish such interference. . . . The officer or employee is

himself interfering with the court when he causes the employer to act. . . . The Legislature has not undertaken to limit the court's power otherwise existing to deal with Bath's contempt." (R. 60; p. 24, *infra*.)

Impliedly, if not expressly, the Court held that Bath was not an "employer" within the meaning of the statute. The Court's reference to interference with the Court constituting contempt which the Court would have the power to punish apart from the statute, and the statement that the Legislature has not undertaken to limit the Court's power *otherwise existing* to deal with Bath's contempt, indicate that the Court's holding was that the conviction in the Superior Court was affirmed on the ground that Bath's conduct constituted a contempt punishable at common law.

The complaint was entitled "Complaint Contempt of Court under General Laws, Chapter 268, Section 14A" (R. 10). The pleadings and the trial judge's report of findings and rulings manifest that in the trial court the issue was understood to be whether Allan W. Bath was guilty of contempt under G.L. c. 268, § 14A (R. 10-30; pp. 15-20 *infra*).

The plain and ordinary meaning of "contempt of court under G.L. c. 268, § 14A," is "contempt of court as provided by G.L. c. 268, § 14A." Only one contempt of court reasonably appears to have been provided by the statute, and that is discharge of an employee-juror, because of jury service, *by an employer*. Because of the specification in the heading to the complaint, Bath should have reasonably understood that he was charged with contempt by reason of being Larson's employer and having discharged Larson because of his service as a juror. Bath was charged with a statutory offense of which an essential element was that he was the employer of the discharged employee. He was

warranted in relying, if he saw fit, on the defense that he could not be convicted of contempt under G.L. c. 268, § 14A, because the Commonwealth could not establish that he was Larson's employer, which he was not. He was justified, then, in being guided by this reliance in planning the conduct of his defense at the trial, including a determination not to testify and not to call witnesses.

It is not material that Bath could have been charged with common-law contempt and properly convicted if that be so. He was not charged with common-law contempt. Bath was entitled to be judged on the basis of the charge as made and upon which the trial was conducted. Bath relies upon the following cases in support of his contention that he could not be convicted of common-law contempt in this case consistently with due process. *Cole* v. *Arkansas,* 333 U.S. 196, held that it is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made, and that, to conform to due process of law, petitioners on appeal were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial Court. The Court in *De Jonge* v. *Oregon,* 299 U.S. 353, 362, stated: "Conviction upon a charge not made would be sheer denial of due process." The law is similarly stated by this Court in *Garner* v. *Louisiana,* 368 U.S. 157, 164.

If the decision of the Supreme Judicial Court is that the statute is not directed solely to the conduct of employers, but is directed as well to the conduct of any other person, and that Bath violated it, and he was convicted as charged, the conviction is none the less a deprivation of due process.

Whether the statute extends and broadens the scope of contempt so as to include conduct not constituting contempt

at common law, or is simply a codification of the common law as it relates to the prohibited conduct, the extension or codification on its face is clearly limited to the conduct of employers. Although interference with the Court by any person may constitute contempt at common law, the language employed by the Legislature discloses an intention by that body to codify that rule only as it applies to interference with jurors by employers. Conduct of employers which constituted contempt at common law also constitutes statutory contempt. If the Legislature did not intend to limit its codification to employers, and to define the statutory offense as prohibited conduct by an employer, the entire second sentence of the statute, to the effect that "Violation of this section by an employer shall be a contempt . . . and such employer may be prosecuted upon complaint . . . ," is surplusage and without any meaning whatsoever. If the Legislature intended that the statutory offense shall consist of the prohibited conduct by anyone, the second sentence would not have been incorporated in the statute.

It seems unnecessary to cite case or other authority for the proposition that Allan W. Bath was constitutionally entitled to have the charge against him fully and plainly described in the complaint, and that, if the complaint was misleading as to the offense with which he was charged, and he was thereafter convicted, he was denied due process guaranteed by the United States Constitution. The complaint was entitled: "Complaint Contempt of Court under General Laws, Chapter 268, Section 14A." The statute is incorporated into the title of the complaint by the reference to it. In order to interpret the complaint, Bath was invited, and even required, to interpret the statute. As the trial judge stated in his "Findings of Fact and Rulings of Law," this was a case of first impression in the Commonwealth (R. 26; p. 17, *infra*). On its face the stat-

ute clearly defines as contempt the act of an employer discharging persons from employment because of jury service, and Bath could not reasonably be expected to be on notice that he was charged only with a violation of the "mandate" of the statute and not with conduct defined in the statute as a contempt, namely violation of the "mandate" *by an employer*. The separation of the statute into two such distinct elements is a fragmentation which does violence to the plain purpose and intent of the statute, which manifestly is to define an offense and prescribe punishment for certain conduct of an "employer." The statute must be read as a whole. It is difficult to comprehend the distinction which the Supreme Judicial Court makes between a violation of the "mandate" of a statute and a violation of the statute itself, and it would have been very nearly impossible for Bath to anticipate such a distinction. The significance of this is that Bath was given notice that he should prepare his defense to a charge that, as employer, he discharged Larson from his employment because of his service as a juror, and then, having successfully resisted the charge as made, he was convicted of an offense not requiring proof that he was Larson's employer. Although persons in the future may be on notice that the Supreme Judicial Court has given a strained and distorted interpretation to G.L. c. 268, § 14A, and that "Contempt of Court under General Laws Chapter 268, Section 14A," means violation of the first sentence of that statute by anyone, whether an employer or not, Bath did not have such notice, and as to him a conviction on that basis is a denial of due process. In *Bouie* v. *City of Columbia*, 378 U.S. 347, 352, the United States Supreme Court said:

> "When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may

> arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta,* or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the conduct in question."

The cases referred to in this quotation from the *Bouie* case are *Connally* v. *General Construction Co.,* 269 U.S. 385, and *Lanzetta* v. *New Jersey,* 306 U.S. 451.

The *Bouie* case holds that an unforeseeable construction and retroactive application of a criminal statute violates due process because a potential defendant is misled into thinking that contemplated conduct, subsequently held to be unlawful, is lawful. By the very same reasoning, the instant complaint into which was incorporated G.L. c. 268, § 14A, lulled Bath into a false sense of security, giving him no reason to suspect that he was charged with conduct other than as Larson's employer and inviting him to rest his defense on the failure of the Commonwealth to prove he was Larson's employer as charged. This offends fundamental concepts of fair play, and is as much a denial of due process as was present in the *Bouie* case.

2. The understandable zeal of the courts to discourage and restrain interference with the judicial process should not override the imperative constitutional limitations upon judicial action. Any intentional interference with the functioning of judicial administration warrants the most severe condemnation by the courts but certainly not at the risk of an at least equally serious infringement of fundamental rights of the individual guaranteed by our Constitution. This Court is ever vigilant to protect individuals against the use of unconstitutional means by the administrative and legislative branches of government to accomplish desirable objects. Surely such vigilance is equally appropriate when an individual is denied due process by a state court of last resort, regardless of the merit of its purpose in doing so.

Conclusion.

This case presents a highly important question with respect to the application of due process in criminal cases in state courts. It is therefore urged that this petition for a writ of certiorari be granted, and the judgment below reversed.

Respectfully submitted,

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332 Main Street,
Worcester, Massachusetts 01608.

Appendix A—Opinion of the Trial Court.

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. Superior Court

COMMONWEALTH OF MASSACHUSETTS

vs.

JOHN BATH & COMPANY, INCORPORATED

and

ALLAN W. BATH

CONTEMPT

FINDINGS OF FACT AND RULINGS OF LAW

I find that Roland [*sic*] K. Larson of the town of Millbury was, at all times material hereto, a regular employee of the defendant John Bath & Company, Incorporated (hereinafter called Bath Co.) and that, at all times material, Allan W. Bath was a vice president of the Bath Co. in charge of manufacturing operations.

Larson was employed at the company's manufacturing plant located at 10 Mann Street in the City of Worcester, a distance of three miles from the Superior Courthouse and approximately seven miles from the neighboring town of Millbury, where Larson resided.

Normally he operated an automatic point grinding machine in the machine shop of the company's plant.

The operation of this machine required a continuous and uncontrolled flow of lubricating oil to fall upon the grinding wheel while the metal products were being pointed or ground.

Concomitant with this process there was a considerable spattering of oil and an oil mist of some magnitude pervaded the entire atmosphere in and throughout the machine shop during all hours of operation.

Consequently, after any appreciable amount of working time the employees' (including Larson's) shoes, working

clothes and, indeed, their persons were, of necessity, completely permeated with oil.

Notwithstanding this there were no bathing facilities whatsoever and only limited washing facilities at the plant which were available for the use of the employees. Hot water, for example, was seldom, if ever, provided.

At some time prior to April 2, 1962 Larson received his call for jury duty and notified his foreman thereof. No conversation of significance took place then.

On April 2, 1962 Larson reported for service and attendance as a traverse juror in and for the Superior Court sitting in Worcester County, and at all times material hereto, he so served and attended. The duration of this jury session was April 2 to and including May 4, 1962.

On the evening of April 3rd Larson received a phone call from his foreman at the company plant directing him to report for work each morning during his jury service between the hours of 7:30 and 9:15 A.M.

Larson replied, in substance, that the circumstances did not permit this and declined to comply.

On April 5, 1962, by registered mail, Larson received a letter from the defendant Allan W. Bath signed by him as "Vice President—Mfg." on the letterhead of the Bath Company.

This letter directed Larson to report for work between the hours of 7:30-9:15 A.M. during his term of jury service under penalty of discharge.

Chronologically thereafter there followed two conversations between Allan W. Bath and Larson, one on the telephone and another on April 19th at a meeting at the company plant where union officials were present.

The substance of these two conversations was the same. Mr. Bath directed Larson to work between the hours of 7:30-9:15 A.M. while on jury service under penalty of dis-

charge. Larson protested his inability to do so and declined.

On April 23, 1962 Larson received, again by registered mail, a letter also signed by the defendant Allan W. Bath as "Vice President—Mfg." notifying him of his discharge for "repeated insubordination" in failing to obey directions "to report for work mornings from 7:30 A.M.-9:15 A.M. while serving on jury duty."

ISSUES

Whether or not either or both of these defendants has violated Sec. 14 A of Chapter 268 of Massachusetts General Laws which reads as follows: "Penalty for Discharging Employee Because of Jury Service. No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

In so far as this Court is able to determine, this is a case of first impression in the Commonwealth.

Absent any authority on the issues, it becomes important to their proper resolution to inquire into the intent and purpose of the legislation.

Clearly the primary intent of this statute is to preserve, promote and safeguard the jury system which is, indeed, the very bulwark of the administration of justice in this Commonwealth.

Certainly the effectiveness of this venerable institution (the jury system) increased in inverse proportion to the number and degree of social and economic pressures suf-

fered by the individual jurors. This legislation is designed to eliminate one such pressure.

It has been said that "Adequate provision for one's family is the first consideration for most men" and a person who serves as a juror under conditions which expose him to job loss and thus, financial insecurity for his family, is not likely to have the spiritual contentment and mental detachment that good jurors require.

Equally clearly, this statute is designed to place the juror, a part of the court system, under the aegis of the court during his term of service.

In effect, the juror is placed "in custodia legis et curiae" or protected by law and the court and beyond interference by his regular employer.

To the end of such protection, the legislature has endowed the courts with the power of contempt, in this regard, to punish proven transgressors.

Certainly, also, this legislation clearly contemplates (and practice has shown) the complete unpredictability of the hours of jury service.

While this very extraordinary matter was being heard, a jury in a neighboring county deliberated for fifty-one consecutive hours.

The irregularity of the hours of jury service would more often than not preclude a juror from making faithful compliance to a regular employment commitment to his employer. Further, the jurors' natural and understandable worry and apprehension about this would be likely to impair his performance as a juror.

It should be noted that by practice and tradition the Superior Court hears and determines requests for excuse from, and deferment of, jury service from prospective jurors as well as from others, including employers of prospective jurors, on the issue of financial hardship to the

employer arising from the jury service of an indispensable employee.

This determination is made by the Court before jury service begins.

On all the facts as found and set out herein, I rule that Larson could not reasonably be expected to have adequately performed both jury duty and his employment requirements as directed by Mr. Bath.

In view of the time elements involved, the distances, the lack of bathing facilities, indeed, under all of the circumstances the conditions imposed by Bath were unreasonable.

This Court is compelled to say that jurors in their term of service must be entirely free of compulsory non-jury assignments, under threat of discharge, from their regular employer.

It is my view that *any* such non-jury assignment from an employer under penalty of discharge, however reasonable it may appear, might interfere with the juror's availability for service, or with his peace of mind, with a consequent deleterious effect upon the system of administration of justice.

In short this Court adopts the view that a juror is a juror twenty-four hours each day during his term of service and any requirement by an employer under threat of discharge which derogates from this principle would (upon discharge for failure of compliance) be violative of this statute.

The argument has been advanced that Allan W. Bath, the individual, was in fact not the employer and therefore he could not, in his individual capacity be adjudged in contempt under the terms of this statute.

It is clear from the facts found that Allan W. Bath was, throughout, the person in control of the action of the corporation in the discharge of Larson. Bath cannot now avoid personal responsibility therefor by cloaking himself in his corporate garb.

Massachusetts General Laws Chapter 268 Sec. 14 A declares that a particular type of interference by an employer with a member of the jury shall constitute contempt. The employer is, in this case, the corporation and it may, therefore, be held in contempt.

The statutory command to the corporation is, in effect, a command to those individuals within the corporation who are responsible for the discharge of the employee-juror. In this case Allan W. Bath was the individual so responsible and I so find.

He has failed to do what the law required of him and he may be thus liable in his natural capacity.

This is no more than to say that the contempt of the corporation is as well the contempt of that agent of the corporation who committed the contumelious act.

Wilson vs. *U.S.* 231 U.S. 361
Commissioners vs. *Sellew* 99 U.S. 624, 627

The conduct of these defendants and both of them, in the view of this Court, placed their economic considerations above the proper functioning of the jury system and its preservation as guaranteed to all of us by the laws of the Commonwealth. Such acts offend the common weal and are not to be lightly treated.

I am convinced beyond a reasonable doubt that both of these defendants have wilfully violated Sec. 14 A of Chapter 268 of Massachusetts General Laws.

I rule that such violation was contumacious of the authority and majesty of the Superior Court and derogatory of the proper administration of justice in this Commonwealth.

The John Bath & Company, Incorporated and Allan W. Bath are both adjudged to be in contempt of the Superior Court in and for the County of Worcester.

ROBERT SULLIVAN *JSC*

May 7, 1962
A True Copy by Photostatic Process
Attest: JOHN F. O'CONNOR
Assistant Clerk
(SEAL)

Appendix B—Opinion Below as it was First Written.

JOHN BATH & COMPANY, INC. & another *vs.* COMMONWEALTH

WHITTEMORE, J. The petitioners for writ of error, John Bath & Company, Inc., and Allan W. Bath, its vice-president, seek to have set aside judgments of the Superior Court of May 7, 1962, holding them in contempt for discharging an employee for refusing to work while on jury service. The case was reserved and reported by a single justice.

The complaints for contempt are entitled "Complaint Contempt of Court under G. L. c. 268, § 14A." This statute provides "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

The return includes the findings and rulings of the judge of the Superior Court. Ronald K. Larson, the discharged employee, reported for jury service in Worcester on April 2, 1962, having theretofore told his foreman of the call for jury duty. The jury session was to continue to May 4, 1962. On the evening of April 3, the foreman directed Larson to report for work between the hours of 7:30 A.M. and

9:15 A.M. each day during his jury service. Larson replied in substance that the circumstances did not permit this and declined to comply. On April 5, Larson received by registered mail a letter on the letterhead of the corporation signed by Bath as "Vice President—Mfg." directing him, on penalty of disciplinary action or discharge, to report for work as ordered by the foreman. There followed two conversations between Larson and Bath, in each of which the direction under penalty of discharge was repeated and Larson protested his inability to comply. The second of these conversations was in the presence of labor union officials at the company plant on April 19. On April 23, Larson received another registered letter from Bath as "Vice President—Mfg." notifying him of his discharge for "repeated insubordination" in failing to obey directions "to report for work mornings from 7:30 A.M.—9:15 A.M. while serving on jury duty."

Larson's place of employment was three miles from the court house in Worcester and about seven miles from his home in Millbury. His workday began at 7:30 A.M. Normally he operated a grinding machine and was subjected to a considerable spattering of oil and an oil mist from the flow of lubricating oil upon the grinding wheel. After any appreciable working time, Larson had oil on his shoes, clothes, and person. There were at the plant no bathing facilities and only limited washing facilities available for employees' use. Hot water was seldom provided.

The judge found that Larson could not have reasonably been expected adequately to perform both his jury duty and the employment requirements and that, under all the circumstances, the conditions imposed by the employer were unreasonable. He stated the view that jurors must be free of compulsory nonjury assignments under threat of discharge inasmuch as any such assignment might inter-

fere with the juror's availability or his peace of mind. The judge construed the statute as a command to those individuals within the corporation who act for it and ruled that the contempt of the corporation was Bath's contempt also. He ruled that the violation of the statute by the petitioners was derogatory of the proper administration of justice. The judge found that both petitioners had wilfully violated the statute.

The review is limited to questions of law apparent on the record. *New England Novelty Co. Inc.* v *Sandberg,* 315 Mass. 739, 747-748, and cases cited (cert. den. 323 U. S. 740; rehearing den. 323 U. S. 815). *Hansen* v. *Commonwealth,* 344 Mass. 214, 222. No error is shown.

The petitioners contend that the subsidiary findings show that Larson was discharged for insubordination rather than because of his "attendance or service" as a juror, so that it was error in law to find violation of the statute. They ask us, in effect, as we understand their position, to rule that there was in the requirement that Larson work each day before going to court no necessary interference with jury duty, that it is inferable that the requirement would have been reasonably enforced by the employer so as not to cause any such interference, and that Larson's refusal to comply was not because of anticipated inability, but rather because of an unreasonable insistence on jury duty as an excuse for not working.

The issue, however, is not whether the employee might have worked each morning without impairing his effectiveness as a juror. The issue, as we view it, is whether the work requirements imposed upon the employee risked impairment of that effectiveness. Imposition of such risk was an interference with a juror's primary obligation, his jury service. Such interference was an interference with the proper functioning of the court.

Larson, rightly, as it turned out in view of the judge's findings, acted on the assumption that his "service as a . . . juror" was incompatible with his working every day from 7:30 A.M. to 9:15 A.M. When the employer discharged him for not working every day, it discharged him because he had acted rightly to keep his obligation to perform jury service paramount. That was discharge because of "service as a . . . juror" within the meaning of the statute.

We do not agree with the petitioners that the sole basis of the judgments below is the judge's conclusion that any work requirement even though it would not risk impairment of the employee's effectiveness as a juror, assuming a discharge for a violation thereof, would be a violation of G. L. c. 268, § 14A. We need not determine whether there might be requirements of an employer for sporadic, emergency or other work by the employee that would be so plainly compatible with the employee's jury service that sanctions could be imposed by the employer.[1] But here the issue is narrowed by the judge's finding that the requirement imposed on Larson was unreasonable. This supports the conclusion that the requirement interfered with the functioning of the court.

The petitioner Bath contends that he was not in contempt of court because the statute makes only a violation by the employer a contempt.

The statute gives legislative recognition to the proposition that discharging an employee because of jury duty would be interference with the court. Apart from the statute's declaration that violation of its terms is contempt,

[1] Certainly, in any case, the course of prudence would be for the employer or employee or both to refer any doubts to the judge to whom the juror is responsible in his paramount obligation and who alone is empowered to excuse a juror from the full performance of the duty to which he has been summoned.

the court would have power to punish such interference. See *Cartwright's Case,* 114 Mass. 230, 238; *New England Novelty Co. Inc.* v. *Sandberg,* 315 Mass. 739, 746; *People* v. *Huggins,* 258 Ill. App. 238, 243; *People* v. *Vitucci,* Ill. App. 2d , .* The officer or employee is himself interfering with the court when he causes the employer to act. See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347 (violation of court decree). The Legislature has not undertaken to limit the court's power otherwise existing to deal with Bath's contempt. Such an attempt would raise a serious constitutional question. *Opinion of the Justices,* 314 Mass. 767, 782.

It is inconsequential that the complaints and the judge's rulings made no reference to the power of the court apart from the statute. In the prosecution of a case for contempt technical accuracy of pleading is not required. *Woodbury* v. *Commonwealth,* 295 Mass. 316, 323. See, for the rule that a reference in an indictment to a statute may be disregarded when the offense is punishable at common law only, *Commonwealth* v. *King,* 13 Met. 115, 119. *Commonwealth* v. *Reynolds,* 14 Gray 87, 89. See also G. L. c. 277, § 34.

The findings of subsidiary facts do not show whether the petitioners knew of the statute. The petitioners do not contend that there was error in law in the judge's finding of wilful violation and we discern none. The finding in context means, we think, that the petitioners, by their intentional acts, assumed the risk of interference with the court and what that might entail.

Judgments affirmed.

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* 199 N. E. 2d 78, 79.

Appendix C—Application for Rehearing.

November 20, 1964

Honorable Raymond S. Wilkins
Chief Justice
Supreme Judicial Court
Court House
Pemberton Square
Boston, Massachusetts
Re: John Bath & Company, Inc. et al vs.
Commonwealth of Massachusetts

My dear Chief Justice:

This is an application for rehearing and reconsideration of the decision in the above case. It is presented on behalf of Allan W. Bath, one of the plaintiffs in error (hereinafter called the "individual defendant") who had been adjudged guilty of a contempt of court. The Supreme Judicial Court affirmed this judgment.

The Complaint against the individual defendant, as well as against the corporate defendant, of which the individual defendant was an officer, was entitled "Contempt of Court under General Laws, Chapter 268, Section 14A." The judgment of the Superior Court was that both defendants were in violation of this statute and they were both accordingly adjudged in contempt.

The opinion written by Mr. Justice Whittemore did not hold that the above statute directed against an "employer" would include within its purview an officer of the employing corporation; but did hold that the judgment of the Court below to the effect that the individual defendant was guilty of a contempt of court by reason of a violation of the statute should be affirmed regardless of whether

said defendant had in fact violated the statute, on the ground that the conduct of said individual defendant was sufficient to constitute an offense punishable at common law. It is submitted that this decision violates the provisions of the Fourteenth Amendment of the United States Constitution. Consequently request is now being made on behalf of the individual defendant for reconsideration of this Court's decision and for further hearing and argument on this issue.

The case was before this Court on a Petition for Writ of Error. A juror employed by the corporate defendant was discharged from employment for failure to report for work from 7:30 A.M. to 9:15 A.M. on days when he was required to perform services as a juror. In this connection the individual defendant, a Vice President of the corporate defendant, acted on behalf of the corporation.

A Complaint entitled in its heading "Complaint—Contempt of Court under General Laws, Chapter 268, Section 14A" was filed by the District Attorney against the individual defendant and a similar complaint, bearing the same title, was filed against the corporate defendant. The Answer filed by the individual defendant entitled "Defendant's Answer to Complaint for Contempt of Court under General Laws, Chapter 268, Section 14A" set up as a defense to the complaint that "as a matter of law and fact he was not an employer of the juror and therefore could not be found to have violated the provisions of said statute which provides in part that 'violation of this section by an employer shall be a contempt . . .'"

Before the hearing the individual defendant also filed a motion to quash the Complaint on the ground that the Com-

plaint did not allege that said defendant was an employer of the juror and that he therefore could not be found to have violated the statute under which he was being charged with contempt (R. p. 20). Likewise, at the conclusion of the hearing, the individual defendant's Requests for Rulings were directed exclusively to the provisions and fair intendment of said statute.

All of the pleadings are directed solely to the issue of whether each defendant had violated the statute as charged in the Complaint. The judge in the Court below, the District Attorney. the defendants and their counsel, and the office of the Attorney General in its brief filed in the proceedings in this Court on the petition for a writ of error, all proceeded on the basis of the alleged violation of the statute being the sole issue in the case and for which the defendants were tried and for which judgment was entered in the Court below. The first reference to a common law contempt as an issue in these proceedings appeared in the Opinion rendered in this case. It certainly could not fairly be said that the individual defendant had received due notice or had been fairly apprised that he had been charged with and tried for any offense other than the violation of the statute specified in the Complaint.

This was not a contempt committed in the presence of the Court. A hearing was held and evidence was presented by the District Attorney. It does not appear that the individual defendant testified at the hearing. The evidence is not reported. The findings of fact must be determined only on the basis of the reported "Findings of Fact and Rulings of Law" of the Court below, which appear in the record.

On the basis of such findings there could be no question that both defendants were tried in the Court below for violation of the statute and that the judgments were that each defendant was guilty of a violation of this statute.

In the Findings of the Court below, under the heading of "Issues" that Court stated the issues as follows: "Whether or not either or both of these defendants has violated section 14A of chapter 268 of the Massachusetts General Laws which reads as follows . . ." (R. p. 26). The Court below further went on to say "this is a case of first impression in this Commonwealth." Obviously this could have no reference to a common law contempt. The Findings then undertook to analyze the purpose and intent of the statute and its application to the case at bar (R. pp. 27-29). On page 29 of the Record the Court below made a ruling of law, adverting to the defense raised by the individual defendant that he was not an "employer" under the statute, as follows:

> "the statutory command to the corporation is, in effect, a command to those individuals within the corporation who are responsible for the discharge of the employee-juror. In this case Allan W. Bath was the individual so responsible and I so find."

The findings also on page 30 of the Record were to the effect that:

> "I am convinced beyond a reasonable doubt that both of these defendants have willfully violated section 14A of chapter 268 of Massachusetts General Laws."

Clearly, both the specifications of the Complaint against the individual defendant and the findings of the Court be-

low were confined and restricted to a complaint alleging a violation of the statute and a judgment to the effect that such a violation had been committed. No other conclusion is fairly warranted from the Record.

In its Opinion this Court makes no determination that the individual defendant was in violation of the statute in question. The gravamen of the Opinion, in affirming the judgment against the individual defendant, is that:

> "Apart from the statute's declaration that violations of its terms is contempt, the Court would have power to punish such interference. The officer or employee is himself interfering with the court when he causes the employer to act. The Legislature has not undertaken to limit the court's power otherwise existing to deal with Bath's contempt. . . . It is inconsequential that the complaints and the judge's rulings made no reference to the power of the court apart from the statute. In the prosecution of a case for contempt technical accuracy of pleading is not required."

The question in this case is not whether the individual defendant could have been charged with a common law contempt or whether his conduct in fact constituted a common law contempt. The constitutional question here involved, of no minor importance, is whether under our Bill of Rights and specifically under the Fourteenth Amendment of the United States Constitution an individual is entitled to be apprised with reasonable accuracy of the crime or violation of the law with which he is charged, so that he may adequately defend himself.

Because of the specific nature of the complaint the individual defendant was warranted in relying, if he saw fit, upon

the defense that he could not be held to have violated the statute because he was not in fact the "employer". On this basis he could have decided, or have been advised by counsel, not to testify in the proceedings. For aught that appears the individual defendant did not testify at the hearing in the Court below. It is of major significance that the individual defendant did not have a trial for a common law contempt. In this connection it is also of significance that in contempt proceedings the evidence is not reported on appeal and any remedy which may be available on appeal must be sought only through a writ of error, wherein the defendant does not have the benefit or privilege of contesting findings which may not have been warranted by the evidence. This would seem to require much greater regard for the full and adequate opportunity which should be afforded a defendant to properly defend himself and protect whatever legal rights may be available to him on the basis of the specific violation of law with which he is charged.

We submit that the Court inappropriately cited the case of *Woodbury* vs. *Commonwealth* 295 Mass. 316, 323 to excuse the fact that the individual defendant was never notified that he was charged with a common law contempt. In *Woodbury* the plaintiff in error argued that the district attorney's affidavit, substituted for a complaint, was irregular. The Court held that the affidavit, as a formal document, was a sufficient pleading to institute a proceeding for contempt. Therefore the issue in that case was the formal recognition to be accorded the affidavit as a pleading, and not the adequacy of its notice.

Woodbury in fact supports the basic principles that in contempt cases "the proceedings leading up to the punishment should be in accordance with the principles which govern

the practice in criminal cases"; and that "in the prosecution of contempt not committed in open court, the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." (p. 323) The statement in that case to the effect that "technical accuracy of pleading however is not required" requires careful scrutiny as to the nature of the "technicalities" involved in a given case. This should not be confused with what might be termed "technicality of pleadings" which fail to give due and adequate notice to an accused of the charges against him, involving a matter of substance rather than mere form.

The cases which *Woodbury* cites, namely *Schwartz vs. United States,* 217 Fed. 866 (4th Cir. 1914) and *Conley vs. United States,* 59 F. 2d 929 (8th Cir. 1932), are not applicable to the case at bar. They involved arguments, in *Schwartz,* that the charge should have been dismissed for indefiniteness, and in *Conley,* that the information did not state sufficient facts. In these two decisions by federal courts the statement that technical accuracy of pleading is not required in a charge for contempt means that the defendant cannot challenge the pleading for technical deficiencies such as indefiniteness, duplicity and failure to allege sufficient facts. It is important to note that these cases do not in any way deprive a defendant of the right to claim denial to him of due process, and consequent violation of his constitutional rights, on the ground that the pleading containing the charge failed to give him due notice of the offense or violation of law for which a judgment against him is rendered.

Nor are the cases, *Commonwealth vs. King* 13 Met. 115, 119, *Commonwealth vs. Reynolds,* 14 Gray 87, 89, and G. L. c.

277, Sec. 34 in point. The fair intendment of these decisions is that if an indictment charges either or both a common law and a statutory offense and there is no statute prohibiting the offense, then the catch-all phrase at the end of the indictment, "contrary to the form of the statute," may be dropped as surplusage. This principle would appear to have no application to a case, as here, where violation of a specific statute only is charged in the complaint. In neither of these cited cases was there in issue, as in the case at bar, whether the defendant had fair warning of the violation of law for which judgment was rendered against him. In *Commonwealth vs. King, supra,* the defendant had notice that the indictment charged a common law offense because he argued in his exceptions to the Court that the offense proved was not an offense at common law. The defendant in *Commonwealth vs. Reynolds, supra,* had notice that the indictment alleged a common law offense because in his exceptions to the Court he argued that the indictment did not set forth sufficient facts to constitute a common law offense.

The decision of the Supreme Judicial Court deprived Allan Bath of his right to notice of the offense of which he was convicted and thereby violated the Fourteenth Amendment of the United States Constitution. *Cole vs. Arkansas,* 333 U. S. 196 (1948) is squarely in point. In *Cole, supra,* petitioners were tried in a state court under an information charging them only with a violation of section 2 of a state statute, making it an offense to promote an unlawful assemblage. The trial court instructed the jury that they were charged with an offense under section 2; and they were convicted. They appealed to the state supreme court, contending that section 2 was contrary to the federal constitution. Without passing on that question, the state su-

preme court sustained their convictions on the ground that the information charged and the evidence showed that petitioners had violated section 1 of the same statute, which described the distinct offense of using force and violence. The Supreme Court held that the petitioners were denied due process of law, reversed the judgment and remanded the case to the state supreme court for further proceedings. The Supreme Court held: (a) It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made; and (b) To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. See also *In re Green*, 369 U. S. 689, 691-92 (1962); *Garner vs. Louisiana*, 368 U. S. 157, 164 (1961); *De Jonge vs. Oregon*, 299 U. S. 353, 362 (1937).

The understandable zeal of the courts to discourage and restrain interference with the judicial process should not override the imperative constitutional limitations upon judicial action. Any intentional interference with the functioning of judicial administration warrants the most severe condemnation by the courts, but certainly not at the risk of an at least equally serious infringement of fundamental rights of the individual guaranteed by our Constitution.

We believe that if the Supreme Judicial Court grants the individual defendant an opportunity to formally present the above arguments, the Court may be persuaded to reach a different decision in this case. The constitutional question raised is of considerable importance, and may also have an important bearing on criminal procedure in this

Commonwealth. We respectfully urge the Court to grant a rehearing in order that there may be presented these reasons for reconsideration of the decision. We believe that the constitutional consideration here presented is of sufficient merit and importance to warrant favorable action on this request.

Respectfully yours,

George H. Mason
Vaughan, Esty, Crotty & Mason
Attorneys for the defendant,
Allan W. Bath

GHM:mlg

Appendix D—Substituted Final Page of Opinion Below

attempt would raise a serious constitutional question. *Opinion of the Justices,* 314 Mass. 767, 782.

It is inconsequential that this complaint and the judge's rulings made no reference to the power of the court to punish for a contempt apart from the statute. It is enough that the complaint alleged that Bath, as vice-president of the corporation, discharged Larson because of his service as a traverse juror and that Bath thereby committed a contempt of court, and that the findings establish that Bath did act as the effective agent of the corporation in causing the discharge. In so acting for the corporate employer Bath himself violated the mandate: "No person shall be discharged . . . because of his . . . service as a . . . juror. . . ." See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347; *Wilson* v. *United States,* 221 U.S. 361, 376-377. The reference to the statute in the title of the complaint can require no more than that Bath's violation of the statute be shown. *Woodbury* v. *Commonwealth,* 295 Mass. 516, 323. Such vio-

lation was a contempt apart from the statutory specification of the employer's contempt.

The findings of subsidiary facts do not show whether the petitioners knew of the statute. The petitioners do not contend that there was error in law in the judge's finding of wilful violation and we discern none. The finding in context means, we think, that the petitioners, by their intentional acts, assumed the risk of interference with the court and what that might entail.

Judgments affirmed.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 973.

ALLAN W. BATH

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the trial Court (Appendix A of petition) is unreported. The opinion of the Supreme Judicial Court of Massachusetts (Appendix, *infra*, p. 8) is reported at Massachusetts Advance Sheets (1964) pp. 1213-1217.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code, § 1257 (3), on the theory that he was denied a right claimed under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Question Presented.

Whether a corporate officer who personally causes the corporation to violate a criminal statute can insulate him-

self from personal responsibility for such crime by invoking the protection of the Due Process Clause of the Fourteenth Amendment.

Statute Involved.

The statute involved, chapter 268, § 14A, of the General Laws of Massachusetts, is as follows:

> "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

Statement.

This criminal prosecution stems from the discharge by the appellant Allan W. Bath, vice-president for manufacturing of John Bath & Company, Incorporated, of one Ronald Larson, a traverse juror, for failing to report to work between 7:30 and 9:15 a.m. on days when his services were required as a juror. The circumstances surrounding Larson's discharge are set out clearly and concisely in the opinion of the trial Court at pages 15-17 of the petition and need not be repeated here. The complaint under which the defendant Allan W. Bath was convicted and fined is set out at pages 4-5 of the petition.

After his conviction, Bath petitioned for a writ of error to the Massachusetts Supreme Judicial Court (R. 1-34).

On October 30, 1964, the Supreme Judicial Court handed down its decision affirming the judgment of the Superior Court (R. 56-51). The petitioner subsequently applied for a rehearing (R. 41-47), in which for the first time he alleged that he had been deprived of a constitutional right. The application for rehearing was denied, and this petition was brought.

Argument.

The issue sought to be raised on this petition is a long-settled and insubstantial one, which no amount of eloquent argumentation can convert into a question worthy of this Court's consideration on certiorari. The holding of the Massachusetts Supreme Judicial Court amounts to nothing more nor less than the well-settled proposition that a corporate officer can be held personally responsible for criminal acts of the corporation which he orders and controls. The other issue which the petitioner seeks to raise, *i.e.*, whether one indicted for a statutory contempt can be convicted of common-law contempt, relates only to some superfluous dicta and is entirely extraneous to the holding of the Court in this case. In any event, none of the federal rights here claimed were timely or properly raised in the Court below.

I. The Decision Below is Clearly Correct.

The petitioner urges that the juror Larson was employed by John Bath & Company, Inc., and not by Allan W. Bath individually, and that consequently the individual defendant cannot be found to have violated the statute.

This contention is without merit, as the trial Court pointed out in its opinion (Petition, p. 19): "It is clear from the facts found that Allan W. Bath was, throughout,

the person in control of the action of the corporation in the discharge of Larson." The respondent respectfully submits that the petitioner's conviction is clearly supported by numerous federal cases.

The criminal responsibility of a corporate officer who assists a corporation to commit a crime was eloquently articulated by the late Mr. Justice Frankfurter in *United States* v. *Dotterweich,* 320 U.S. 277, 281, 283-284. Other federal cases to the same effect are *Maternity Trousseau, Inc.,* v. *Maternity Mart of Baltimore, Inc.,* 196 F. Supp. 456; *United States* v. *Harvey,* 54 F. Supp. 910. See also *Wilson* v. *United States,* 221 U.S. 361, 376, and *Parker* v. *United States,* 126 F. 2d 370, 379; and *Commissioners* v. *Sellew,* 99 U.S. 624, 627, holding that the contempt of the corporation is as well the contempt of the corporate agent who commits the contemptuous act.

II. The Federal Claims Now Asserted were Not Properly Raised in the State Court.

It is mandatory in a petition for certiorari that the petitioner make ". . . specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised . . ." Rule 23 (1) (f). *New York Central Railroad Co.* v. *New York,* 186 U.S. 269, 273. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655. Not only must the federal question have been raised in the state Court, but it must have been raised at the proper point. *Godchaux Co., Inc.,* v. *Estopinal,* 251 U.S. 179, 181. *Brown* v. *Massachusetts,* 144 U.S. 573, 580. There is nothing in the record of the proceedings in the trial Court or in the Supreme Judicial Court to indicate that any federal right was ever asserted until the application for rehearing, following the opinion of the Supreme

Judicial Court, when the petitioner for the first time claimed that he had been deprived of due process under the Fourteenth Amendment.

This Court has said that it will decline to take jurisdiction where the opinion of the highest state Court is completely silent on the federal question, *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291, 309, unless it can be affirmatively shown that the silence of the state Court is not due to any procedural deficiency. *Bailey* v. *Anderson,* 326 U.S. 203, 206-207. The petitioner's failure to make any reference to claim of any federal right at trial or in his assignment of errors in the petition for writ of error operates as a waiver of any such claim. *Beck* v. *Washington,* 369 U.S. 541, 563.

Raising a federal question for the first time in a petition for rehearing addressed to the highest state Court is insufficient to provide a basis for certiorari jurisdiction unless the state Court actually entertained the petition and expressly decided the question. *Radio Station WOW, Inc.,* v. *Johnson,* 326 U.S. 120, 128. *Hanson* v. *Denckla,* 357 U.S. 235, 243-244. *Herndon* v. *Georgia,* 295 U.S. 441, 443. Nor can the petitioner maintain that the decision of the Supreme Judicial Court of Massachusetts was a surprise which could not have been reasonably anticipated from prior decisions, since the principle is well established in this Commonwealth that whoever aids or counsels another in disobeying a judicial decree is himself guilty of contempt. *Commonwealth* v. *Hudson,* 315 Mass. 335, 345. *Alves* v. *Braintree,* 341 Mass. 6, 12.

Clearly, the petitioner has not complied with the mandate of section 1257 (3) that the federal right asserted must have been "specially set up or claimed" in the Court below, which in itself constitutes sufficient reason for denying this petition.

III. The Decision of the Court Below Rests upon an Adequate Non-Federal Basis.

The petitioner finds ambiguity in the opinion of the Supreme Judicial Court and alleges that his conviction may have been sustained by that Court on the theory that, while he may not have violated the statute, he was nevertheless guilty of a common-law contempt.

Such an interpretation does violence to the clear language of the Court and ignores the explicit holding of the case. That holding reads in part as follows:

> "The judge found that Larson could not have reasonably been expected adequately to perform both his jury duty and the employment requirements and that, under all the circumstances, the conditions imposed by the employer were unreasonable. He stated the view that jurors must be free of compulsory nonjury assignments under threat of discharge inasmuch as any such assignment might interfere with the juror's availability or his peace of mind. The judge construed the statute as a command to those individuals within the corporation who act for it and ruled that the contempt of the corporation was Bath's contempt also. He ruled that the violation of the statute by the petitioners was derogatory of the proper administration of justice. *The judge found that both petitioners had wilfully violated the statute.*
>
> "The review is limited to questions of law apparent on the record. *New England Novelty Co. Inc.* v. *Sandberg*, 315 Mass. 739, 747-748, and cases cited (cert. den. 323 U. S. 740; rehearing den. 323 U. S. 815). *Hansen* v. *Commonwealth*, 344 Mass. 214, 222. *No error is shown.*" (Emphasis added.) Appendix, *infra*, p. 10.

The Court's subsequent observation that Bath's violation "was a contempt apart from the statutory specification of the employer's contempt" is nothing more than a dictum, and is in no way essential to the affirmance of the lower court's judgment of conviction.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,

WARREN K. KAPLAN,
Assistant Attorney General.

[Appendix follows.]

Appendix.

Massachusetts Advance Sheets, Pages 1213-1217.

JOHN BATH & COMPANY, INC. & another *vs.* COMMONWEALTH.

Suffolk. October 7, 1964.—October 30, 1964.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

WHITTEMORE, J. The petitioners for writ of error, John Bath & Company, Inc., and Allan W. Bath, its vice-president, seek to have set aside judgments of the Superior Court of May 7, 1962, holding them in contempt for discharging an employee for refusing to work while on jury service. The case was reserved and reported by a single justice.

The complaints for contempt are entitled "Complaint Contempt of Court under G. L. c. 268, § 14A." This statute provides: "No person shall be discharged from or deprived of his employment because of his attendance or service as a grand or traverse juror in any court. Violation of this section by an employer shall be a contempt of the court upon which such person is or has been in attendance or in which he is or has been serving as a grand or traverse juror, and such employer may be prosecuted upon complaint verified upon oath and be punished for such contempt."

The return includes the findings and rulings of the judge of the Superior Court. Ronald K. Larson, the discharged employee, reported for jury service in Worcester on April 2, 1962, having heretofore told his foreman of the call for jury duty. The jury session was to continue to May 4, 1962. On the evening of April 3, the foreman directed Larson to report for work between the hours of 7:30 A.M. and 9:15 A.M. each day during his jury service. Larson replied

in substance that the circumstances did not permit this and declined to comply. On April 5, Larson received by registered mail a letter on the letterhead of the corporation signed by Bath as "Vice President—Mfg." directing him, on penalty of disciplinary action or discharge, to report for work as ordered by the foreman. There followed two conversations between Larson and Bath, in each of which the direction under penalty of discharge was repeated and Larson protested his inability to comply. The second of these conversations was in the presence of labor union officials at the company plant on April 19. On April 23, Larson received another registered letter from Bath as "Vice President—Mfg." notifying him of his discharge for "repeated insubordination" in failing to obey directions "to report for work mornings from 7:30 A.M.—9:15 A.M. while serving on jury duty."

Larson's place of employment was three miles from the court house in Worcester and about seven miles from his home in Millbury. His workday began at 7:30 A.M. Normally he operated a grinding machine and was subjected to a considerable spattering of oil and an oil mist from the flow of lubricating oil upon the grinding wheel. After any appreciable working time, Larson had oil on his shoes, clothes, and person. There were at the plant no bathing facilities and only limited washing facilities available for employees' use. Hot water was seldom provided.

The judge found that Larson could not have reasonably been expected adequately to perform both his jury duty and the employment requirements and that, under all the circumstances, the conditions imposed by the employer were unreasonable. He stated the view that jurors must be free of compulsory nonjury assignments under threat of discharge inasmuch as any such assignment might interfere with the juror's availability or his peace of mind. The judge construed the statute as a command to those indi-

viduals within the corporation who act for it and ruled that the contempt of the corporation was Bath's contempt also. He ruled that the violation of the statute by the petitioners was derogatory of the proper administration of justice. The judge found that both petitioners had wilfully violated the statute.

The review is limited to questions of law apparent on the record. *New England Novelty Co. Inc.* v. *Sandberg,* 315 Mass. 739, 747-748, and cases cited (cert. den. 323 U. S. 740; rehearing den. 323 U. S. 815). *Hansen* v. *Commonwealth,* 344 Mass. 214, 222. No error is shown.

The petitioners contend that the subsidiary findings show that Larson was discharged for insubordination rather than because of his "attendance or service" as a juror, so that it was error in law to find violation of the statute. They ask us, in effect, as we understand their position, to rule that there was in the requirement that Larson work each day before going to court no necessary interference with jury duty, that it is inferable that the requirement would have been reasonably enforced by the employer so as not to cause any such interference, and that Larson's refusal to comply was not because of anticipated inability, but rather because of an unreasonable insistence on jury duty as an excuse for not working.

The issue, however, is not whether the employee might have worked each morning without impairing his effectiveness as a juror. The issue, as we view it, is whether the work requirements imposed upon the employee risked impairment of that effectiveness. Imposition of such risk was an interference with a juror's primary obligation, his jury service. Such interference was an interference with the proper functioning of the court.

Larson, rightly, as it turned out in view of the judge's findings, acted on the assumption that his "service as a

. . . juror" was incompatible with his working every day from 7:30 A.M. to 9:15 A.M. When the employer discharged him for not working every day, it discharged him because he had acted rightly to keep his obligation to perform jury service paramount. That was discharge because of "service as a . . . juror" within the meaning of the statute.

We do not agree with the petitioners that the sole basis of the judgments below is the judge's conclusion that any work requirement even though it would not risk impairment of the employee's effectiveness as a juror, assuming a discharge for a violation thereof, would be a violation of G. L. c. 268, § 14A. We need not determine whether there might be requirements of an employer for sporadic, emergency or other work by the employee that would be so plainly compatible with the employee's jury service that sanctions could be imposed by the employer.[1] But here the issue is narrowed by the judge's finding that the requirement imposed on Larson was unreasonable. This supports the conclusion that the requirement interfered with the functioning of the court.

The petitioner Bath contends that he was not in contempt of court because the statute makes only a violation by the employer a contempt.

The statute gives legislative recognition to the proposition that discharging an employee because of jury duty would be interference with the court. Apart from the statute's declaration that violation of its terms is contempt, the court would have power to punish such interference. See *Cartwright's Case*, 114 Mass. 230, 238; *New England Novelty Co. Inc.* v. *Sandberg*, 315 Mass. 739, 746; *People* v.

[1] Certainly, in any case, the course of prudence would be for the employer or employee or both to refer any doubts to the judge to whom the juror is responsible in his paramount obligation and who alone is empowered to excuse a juror from the full performance of the duty to which he has been summoned.

Huggins, 258 Ill. App. 238, 243; *People* v. *Vitucci,* Ill. App. 2d , .* The officer or employee is himself interfering with the court when he causes the employer to act. See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347 (violation of court decree). The Legislature has not undertaken to limit the court's power otherwise existing to deal with Bath's contempt. Such an attempt would raise a serious constitutional question. *Opinion of the Justices,* 314 Mass. 767, 782.

It is inconsequential that this complaint and the judge's rulings made no reference to the power of the court to punish for a contempt apart from the statute. It is enough that the complaint alleged that Bath, as vice-president of the corporation, discharged Larson because of his service as a traverse juror and that Bath thereby committed a contempt of court, and that the findings establish that Bath did act as the effective agent of the corporation in causing the discharge. In so acting for the corporate employer Bath himself violated the mandate: "No person shall be discharged . . . because of his . . . service as a . . . juror . . . ." See *Commonwealth* v. *Hudson,* 315 Mass. 335, 347; *Wilson* v. *United States,* 221 U. S. 361, 376-377. The reference to the statute in the title of the complaint can require no more than that Bath's violation of the statute be shown. *Woodbury* v. *Commonwealth,* 295 Mass. 316, 323. Such violation was a contempt apart from the statutory specification of the employer's contempt.

The findings of subsidiary facts do not show whether the petitioners knew of the statute. The petitioners do not contend that there was error in law in the judge's finding of wilful violation and we discern none. The finding in context means, we think, that the petitioners, by their inten-

* 199 N. E. 2d 78, 79.

tional acts, assumed the risk of interference with the court and what that might entail.

Judgments affirmed.

Francis P. O'Connor for the petitioners.

Warren K. Kaplan, Special Assistant Attorney General (*James W. Bailey*, Assistant Attorney General, with him), for the Commonwealth.